IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No 30 of 1992
With
CROSS-OBJECTION NO.4 OF 2003

HON'BLE MR.JUSTICE KSHITIJ R.VYAS

and

HON'BLE MR.JUSTICE M.C.PATEL

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

THE STATE OF GUJARAT

Versus

M/S.KOTHARI & ASSOCIATES

Appearance:
MR HL JANI, AGP, for Appellant
M/S THAKKAR ASSOC. for Respondent

CORAM : HON'BLE MR.JUSTICE KSHITIJ R.VYAS
and
HON'BLE MR.JUSTICE M.C.PATEL

Date of decision: 22/01/2004

ORAL JUDGEMENT

(Per : HON'BLE MR.JUSTICE KSHITIJ R.VYAS)

1. The present appeal is preferred by the State of Gujarat under section 96, CPC, against the judgement and decree dated 4th May 1991, passed in Special Civil Suit No.876/89 (Old Special Civil Suit No.224/1983), filed by the present respondent M/s Kothari & Associates. By the said judgement the learned trial judge partly allowed the suit and directed the present appellant-original defendant to pay to the plaintiff a sum of Rs.4,36,408.00 together with interest on the said amount at the rate of 12% per annum from 7.8.1983 till realisation.

2. The present respondent M/s Kothari & Associates has filed Cross-Objection in the present appeal claiming interest at the rate of interest 12% per annum from the date of the demand i.e. from 18.3.1982 instead of 7.8.1982 which is the date of the statutory notice.

3. The short facts giving rise to the present appeal are as under:

3.1 M/s Kothari & Associates-original plaintiff (hereinafter referred to as "the plaintiff"), a registered partnership firm, is carrying on the business of engineering and contractors. The Executive Engineer, Anand Irrigation Division, Anand, invited tenders from public for the work of providing lining to main Canal M.30 to 46 between Ch.41.20 to 46 m., Section II. The plaintiff submitted their tender amounting to a sum of Rs.28,90,795.10ps against the estimated cost of Rs.25,35,11/-. Since the tender of the plaintiff was found to be the lowest, the same was accepted and a regular agreement was entered into between the parties in B-2 Form bearing Agreement No.B/2, 1976-77. Accordingly the work order was given to the plaintiff on 24th September 1976. According to the agreement, the work was required to be completed within 18 months i.e. on or before 23.3.1978.

3.2 The plaintiff contended before the trial court that the contract creates certain mutual bilateral reciprocal contractual obligations, inasmuch as certain reciprocal contractual obligations were required to be performed by the plaintiff and certain reciprocal obligations were required to be performed by the Department. The plaintiff has come out with the case that there was a delay in handing over the site of the canal in time as the Government wanted to continue the Rabi crop. The plaintiff further contended that there

was delay in supply of coal which was available only on permit from the Government. The plaintiff has also raised grievance about short-supply of cement by the Department from time to time, difficulty in getting diesel, irregular supply of electricity and giving the line out very late. Thus, the plaintiff submitted that because of the aforesaid difficulties, the work could be completed only on 7th February 1979.

3.3 According to the plaintiff, the final bill amounting to Rs.29,08,159/- was paid on 18.6.1980. However, since the said bill did not represent the true and correct payment the same was accepted by the plaintiff under protest. Likewise, the security deposit was refunded to the petitioner on 23rd August 1980. According to the plaintiff, during the progress of the work and during its completion, certain disputes had arisen in respect of payment and therefore the plaintiff was constrained to revoke the Arbitration clause by approaching the appropriate court. Ultimately after serving statutory notice on the present appellant on 7.8.1982 the plaintiff filed the aforesaid suit making out the following claims:

3.3.1 As per claim no.1 the plaintiff claimed a sum of Rs.80,426/- on account of price escalation in labour wages due to the prolongation of work and interest at the rate of 18% from due date till payment. According to the plaintiff, the work was required to be completed within 18 months i.e. on or before 23rd March 1978, but the work was actually completed on 7.2.1979 due to the delay caused on the part of the Department. There was a delay of ten and half months. The plaintiff contended that the delay was caused by the Department in handing over the line out of the canal. According to the plaintiff, the Department gave the line out very late at the very initial stage for allegedly keeping the canal running for rabi crop. It is the further contention of the plaintiff that the Department failed to supply coal in time, there was short supply of cement, there was shortage of diesel and frequent interruption of power supply. The plaintiff contended that because of the aforesaid reasons the work could not be completed on 7.2.1979. According to the plaintiff, during this time there was heavy price escalation in labour charges. In support of this claim the plaintiff pointed out that the Department has accepted the labour formula in the plaintiff's other tender of L.T. Dam at Ukai. The details of the claim no.1 are narrated in Statement-A annexed to the plaint.

3.3.2 In claim no.2 the plaintiff claimed a sum of

Rs.9,828.70ps on account of price escalation in fuel lubricants, etc. plus interest at the rate of 18% from due date till its payment. According to the plaintiff, because of the delay on the part of the department, there was rise in the price of fuel lubricants etc, and in support of this claim the plaintiff has pointed out that the then Chief Engineer, Ukai Dam, has accepted the fuel lubricants formula in another tender of the very plaintiff in Ukai Lt. Dam. He, therefore, claimed that the very same formula be accepted as far as the present claim of Rs.9,28.70 ps is concerned. The details of the said claims are narrated in Statement-B annexed to the plaint.

3.3.3 In claim no.3 the plaintiff claimed Rs.1,26,000/- on account of overstay of capital and machinery and claimed interest at the rate of 18% from due date till its payment. It is the contention of the plaintiff that by not handing over the site in time, not supplying the cement in time and delay in supplying the requisite decisions, drawings etc., gross delay was caused resulting into prolonging the work and therefore there is breach of the contract on the part of the Department. Because of the delay there was overstay of capital and machineries at the site for about ten and half months. Under the circumstances the plaintiff has claimed Rs.1,26,000/-, the details of which are mentioned in Statement-C annexed to the plaint.

3.3.4 By way of claim no.4 the plaintiff has claimed Rs.1,69,642.80 on account of overhead expenses i.e. expenses incurred on staff, kitchen, office maintenance, etc. with interest at the rate of 18% per annum from due date till realisation. This is also on account of the delayed performance and the breach of contract committed by the Department.

3.3.5 As per the case of the plaintiff, according to the tender specifications, the banking earth quantity was to be brought from the borrow-pits area and in fact the plaintiff brought the same from borrow-pits and/or spoiled bank. The total quantity excavated was 40709.16 cu.m. for banking. According to the plaintiff, initially the payments were released and made. However, against 40709.16 cu.m., the plaintiff was paid only for 27071.52 cu.m. and therefore they are underpaid for 13637.35 cu.m. of quantity on the plea that the plaintiff has received this quantity from bed and/or slopes, which, according to the plaintiff, is not correct. It is the case of the plaintiff that they were unnecessarily underpaid Rs.51,146.92 and therefore the

plaintiff has claimed the same.

3.3.6 The plaintiff also claimed Rs.39,767.50 on account of loss of interest on security deposit, final bill, bank commission charges, etc. However, the trial court has rejected this claim. The plaintiff has further claimed a sum of Rs.117.20 on account of reduced rate. Further, the plaintiff claimed a sum of Rs.51,140.97 on account of wrongful deduction of quantity from item no.2. The plaintiff has finally claimed a sum of Rs.4,04,534.22 on account of interest at the rate of 18% per annum from due date till payment in respect of the above claims.

3.3.7 The plaintiff has, therefore, prayed to pass a decree for a sum of Rs.8,81,458.95ps along with interest at the rate of 18% per annum on the decretal amount and also prayed for costs.

3.4 The defendant appeared and filed their written statement at Exh.41. The defendant denied the various averments and allegations made in the suit and the amounts claimed by the plaintiff under different heads, and prayed to dismiss the suit with costs.

3.5 The learned trial Judge, after appreciating the oral as well as documentary evidence on record, passed a decree for a sum of Rs.4,36,408/- together with interest at the rate of 12% per annum from 7.8.1983 till its realization. Hence the present appeal came to be filed by the State-original defendant.

4. It requires to be noted that the present suit is with respect to the work for providing lining to main canal no.36 to 46 between Ch.41.2 to 46 M, Section II. The very plaintiff was awarded work for providing lining to main canal No.36 to 46 between Ch.36 M. to 41.2 M Section I. The plaintiff alleged that there was delay in that case also on the part of the Department. Therefore, for the delay caused in the said work the plaintiff has filed a suit being Special Civil Suit No.22/85 in the very same court where the present suit was filed. The aforesaid Special Suit No.22/85 and the present suit i.e. Special Civil Suit No.876/89 were tried by the same Judge and decided on the same date. The plaintiff has filed First Appeal No.34/1992 before this Court against the judgement and decree passed in Special Civil Suit No.22/85. The said First Appeal No.34/1992 along with Cross Objection came up for hearing before a Division Bench of this Court consisting D.K.Trivedi and K.M. Mehta, JJ. The Division Bench by its judgement and order dated 30th July 2003 dismissed the First Appeal and

allowed the Cross-Objection. By allowing the Cross-objection the Division Bench allowed the interest as prayed for by the plaintiff i.e. from the date of the demand mentioned in the notice.

5. Mr. P.M. Thakkar, learned Senior Counsel, has produced a statement giving particulars of both the suits. From a perusal of the same it is clear that the date of the work order, the nature of the work, the stipulated period and time of completion of work are same in both the suits. Even the witnesses and the evidence produced in both the suits are also common. Thus, looking to the facts of both the cases, we are of the opinion that for all practical purposes, factually and legally, both the suits are identical except the change of certain dates and the amount of claims. The earlier Division Bench has gone deep into the case and decided the legality and validity of the claims made by the parties. Under the circumstances, we do not think it is necessary to examine the same questions once again in the present appeal as it would be nothing but a repetition of the analysis of the same reasonings. Mr. H.L. Jani, learned AGP, has fairly accepted this position.

6. In view of the above facts and circumstances and in view of the reasons recorded by the Division Bench in its judgement and order dated 30.7.2003 in F.A. No.34/1992, we see no merits in the present appeal and the same is required to be dismissed. However, for the reasons stated in the aforesaid judgement for allowing the Cross-Objections in the aforesaid First Appeal No.34/1992, we allow the present Cross Objection No.4/2003 filed by the respondent herein and grant the interest from the date of demand i.e. from 18.3.1982 to 7.8.1983 in addition to the interest awarded by the trial court.

7. In the result, the present appeal fails and is dismissed and the Cross-Objection is allowed to the aforesaid extent with no order as to costs.

[KSHITIJ. R. VYAS, J.]

[M.C. PATEL, J.]

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